

CALCUTTA HIGH COURT

Commissioner of Income-Tax

Vs

Steel Brothers Co. Ltd

(Harries, C.J. Banerjee, J.)

15.01.1951

JUDGMENT

Banerjee, J.

1. This is a Reference under Section 66, Indian Income-tax Act made at the instance of the Commissioner of Income-tax, Calcutta. The question on which we are to express our opinion has been formulated as follows:

"Whether on the facts found by the Tribunal, the Tribunal was right in holding that the commission payable to the assessee under the agreement with Attock Oil Co., was governed by Section 42 (3), Indian Income tax Act, for the purpose of computing the total income of the assessee?"

2. Section 42 (3) of the Act is as follows:

"In the case of a business of which all the operations are not carried out in the taxable territories, the profits & gains of the business deemed under this section to accrue or arise in the taxable territories shall be only such profits & gains as are reasonably attributable to that part of the operations carried out in the taxable territories."

3. The facts of the case so far as they are relevant to this judgment may be shortly stated as follows. The assessee is Messrs. Steel Brothers & Co. Ltd. which was incorporated in the United Kingdom & was the managing agent of Attock Oil Company which was also incorporated in the United Kingdom. These companies have their respective offices in London. There were several agreements between the assessee & the Attock Oil Company which were all made in London. Whereby the remuneration payable to the assessee was fixed. It is not necessary to set out the agreements in extenso. The relevant, portions are as follows:

5. The first agreement is dated 10-12-1913, Clause 5 of the agreement is this:

"In addition to such employment as Managing Agents, Steels shall also be employed as sole and exclusive agent. of the Oil Company for the purchase of all ships, machinery, plant, stores, livestock, etc. required by the Oil Company& as sole & exclusive agent of the Oil Company for the sale of all products of the Oil Company. As remuneration for the services of Steels as Agent of Oil Company the Oil Company shall pay to Steels:--

(a) a commission at the rate of 2 1/2% upon the gross price of the Oil Company of all goods so purchased by Steels for the Oil Company &

(b) a commission at the rate of 2 1/2% on the sale price of all goods sold by Steels for the Oil Company".

5. The second agreement, dated 14-11-1921, modified Clause 5 which I have set out above to a certain extent. Clause 3 of the second agreement which modifies Clause 5 is as follows:

"The commission payable to Steels under Clause 5 of the principal agreement shall be payable on the sale price of all goods sold for the Oil Company by any Agent or Sub Agent & the commission to be paid to Steels under such clause as hereby amplified is not to cover expenses incurred by Steels but is to cover services & remuneration of Steels in connection with the head 'supervision & control' & general advice by the Managing Partners of Steels or the Administrative Staff in their employ. Steels will not be entitled to commission under such clause except where the Oil Company do in fact receive the sale proceeds of the goods. The right of Steels to receive commission under such clause shall not be in any way prejudiced as regards the future by the fact that in the past Steels have not actually claimed or received commission on certain purchases made by Steels for the Oil Company."

6. The difference in the two clauses is obvious. Under the first agreement the assessee was to receive commission or remuneration for sale of goods made by it on behalf of the Oil Company. Under the second agreement it was entitled to remuneration for goods sold for the oil company by any agent or sub-agent.

7. The third agreement dated 11-6-1924 introduced a further modification. By that agreement the assessee agreed to part with its exclusive agency for disposal for Aviation Spirit, Benzene, Petrol, Kerosene of the Attock Oil Company. By another agreement, namely, dated 16-4-1930, it consented to Burma Oil Company Limited being appointed the exclusive agent for disposal of Attock Oil Company's other products. But the commission payable to the assessee on sales even after Burma Oil Company had become the sole selling agent of Attock Oil Company remained unaffected. That is to say, Clause 3 of the agreement dated 14-11-1921 read with Clause 5 of the agreement dated 10-12-1913 remained intact so far as they provided for payment of remuneration to the assessee though its position as the selling agent of Attock Oil Company was

taken up by Burma Oil Company. The assessment years in question are 1940-41, 1941-42, & 1942-43. The assessee received from the Oil Company Rs. 4,44,816, Rs. 7,71,667 & Rs. 8,83,560 respectively as commission on sales of oil manufactured by the Oil company & sold by their selling agent the Burma Oil Company.

8. In the assessment years in question the products of the oil company were manufactured in India & the business processes were carried out in India, & the sales by Burma Oil Company took place in India. It is clear that the assessee is a non-resident company and the Income-tax Officer rightly treated it as a non-resident company. It has various activities & among others, is the managing agent of the oil company.

9. The Income-tax Officer held that the income of the assessee accrued in India because the sales were effected in India. The appellate Assistant Commissioner on appeal however took a different view. He held that the assessee had ceased to do anything with the actual sale of the Oil Company's products. All the assessee's activities connected with the delivery & sale of the Oil Company's products had been taken up by the Burma Oil company & the commission which was paid to the assessee was for supervision, control & general advice from London.

10. According to the Appellate Assistant Commissioner Section 4 (1), Income-tax Act, had no application. He held that as there was business connection between the assessee & the Oil Company the pro-per section to be applied was Section 42 (3), Indian Income-tax Act. From the order of the appellate Assistant Commissioner there was appeal to the Tribunal. The Tribunal, agreed with the view expressed by the Appellate Assistant Commissioner & held that in this case Section 42, would apply & not Section 4 (1).

11. This reference arises out of the Order made by the Tribunal & the contention before us on behalf of the applicant, the Commissioner of Income-tax, is that it is not Section 42 but Section 4 (1), that applies. Section 4 (1), Indian Income-tax Act is as follows:

"Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits & gains from whatever source derived which

(a) are received or are deemed to be received in British India in such year by or on behalf of such person, or

(b) if such person is resident in British India during such year.

* * * *

(c) If such person is not residing in British India during such year, accrue or arise or are deemed to accrue or arise to him in British India during such year."

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12. Under Section 4 (1), it is clear that residents & non-residents are alike chargeable in respect

of income which accrues or arises or is deemed to accrue or arise in India. Under Section 42, income is deemed to accrue or arise in India if it accrues or arises directly or indirectly (among others) through or from any business connection in India.

13. It is quite clear in this case that what the assessee has been paid is not its commission or remuneration for selling goods of Attock Oil Company which took place in India, but for its super-vision, advice & control from London. The assessee's remuneration cannot be said to have accrued or arisen in India because it is not by selling the goods that the assessee earned the income. It is attributable mainly to the supervision & control it exercised from London.

14. Dr. S. K. Gupta for the applicant before us has referred the Commissioner of Income-tax, *Bombay v. Chunilal B. Mehta*¹, & to the case of *Nagayya v. Commissioner of Income-tax, Madras*², But these cases are quite distinguishable. In the first case which was decided by their Lordships of the Privy Council the transactions took place in New York & the profits arose there although the control was from Bombay. In the other case the applicant was a non-resident & had been carrying on business in gold & silver in Secunderabad outside British India. He used to purchase gold at Secunderabad & sell the major portion of it at Bombay through brokers. The rest of it used to be sold in Hyderabad itself, a small portion of it being locally sold at Secunderabad. The Bombay brokers with whom the assessee in that case was in touch would telegraphically intimate to the assessee the current prices of gold in Bombay & thereupon advices would be sent from Secunderabad notifying to them the quantity of gold that would be available for sale at those rates. Soon thereafter gold would be sent to Bombay through a representative of the assessee who would get it assayed in the mint and gave the same to the broker who after selling it paid the sale proceeds to the assessee's agent. It is quite clear that the facts of the two cases are different from the facts of the case under consideration. Here the remuneration of the assessee was not payable for doing anything in India, but for supervising & controlling the operations from London. So far as the Oil Company is concerned it is quite true that their income was derived from the sale of oil in India, & the sale having taken place in India their profits accrued in India. But so far as the assessee is concerned, we cannot see how it can be said that its income accrued or arose in India. The assessee was originally the selling agent of the oil company, but it divested itself of that right in consideration of a portion of the remuneration being paid to it for its supervision & control of the business from London. The assessee became entitled to receive the income when the sale proceeds actually reached the hands of the Oil Company. It seems to us therefore that in no sense can it be said that its income, profit or gain accrued or arose in India.

15. Mr. Sukumar Mitra on behalf of the assessee has contended himself to this reference by urging before us that the income did not accrue or arise in India. He said that the assessee could be taxed, if at all, under Section 42, & not under Section 4(1). We think his contention is right & in this Reference we hold that the assessee's income did not accrue or arise in India. If the assessee is liable to be taxed, the proper section applicable is Section 42, Indian Income-tax Act.

16. We, therefore, answer the question asked in the affirmative. The assessee is entitled to the costs of this Reference. Certified for two counsel.

Harries C. J.

17. I agree

Cases Referred.

11. L. R. (1938) Bom. 752
21949-17 I. T. R. 194

